

Supreme Court, U.S.

FILED

SEP 28 1995

OFFICE OF THE CLERK

No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

UNITED STATES OF AMERICA, PETITIONER

vs.

CHRISTOPHER LEE ARMSTRONG, ET. AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARIA E. STRATTON
Federal Public Defender
BARBARA E. O'CONNOR
Deputy Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone (213) 894-2234

Attorneys for Respondent
SHELTON AUNTWAN MARTIN

38 PW

QUESTIONS PRESENTED

A. DOES A NARROW ORDER FOR DISCOVERY CONSTITUTE AN ABUSE OF DISCRETION WHERE THE DISTRICT COURT IS PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED?

B. TO OBTAIN DISCOVERY, MUST A DEFENDANT CONCLUSIVELY PROVE THE ULTIMATE ISSUES SUPPORTING DISMISSAL ON A CLAIM OF SELECTIVE PROSECUTION?

TABLE OF CONTENTSQUESTIONS PRESENTED

A.	DOES A NARROW ORDER FOR <u>DISCOVERY</u> CONSTITUTE AN ABUSE OF DISCRETION WHERE THE DISTRICT COURT IS PRESENTED WITH EVIDENCE PROVIDING A COLORABLE BASIS TO BELIEVE SELECTIVE PROSECUTION MAY HAVE OCCURRED?	i
B.	TO OBTAIN DISCOVERY, MUST A DEFENDANT CONCLUSIVELY PROVE THE ULTIMATE ISSUES SUPPORTING <u>DISMISSAL</u> ON A CLAIM OF SELECTIVE PROSECUTION?	i
I.	<u>OPINIONS BELOW</u>	1
II.	<u>JURISDICTION</u>	2
III.	<u>STATEMENT OF THE CASE</u>	2
IV.	<u>REASONS TO DENY THE PETITION</u>	11
A.	THE ISSUE PRESENTED IS WHETHER THE NARROW DISCOVERY ORDER ISSUED BY THE DISTRICT COURT CONSTITUTED AN ABUSE OF DISCRETION.	11
i.	The District Court Did Not Abuse Its Discretion And Applied The Appropriate Standard In Ordering Discovery.	11
ii.	The Court Of Appeals Did Not Hold That The Evidence Proffered In Support Of The Discovery Request Would Meet The Standard For Dismissal.	16
iii.	This Case Does Not Present An Important Question Of Federal Law And It Has Not Had A Major Impact On The Administration Of Justice.	17
B.	THE COURT OF APPEALS RULING HAS NOT CREATED A CONFLICT AMONG THE CIRCUITS -- ALL CIRCUITS AGREE THAT A DEFENDANT MUST PROVIDE EVIDENCE OF SIMILARLY SITUATED NON-PROSECUTED INDIVIDUALS TO OBTAIN DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION.	21
V.	<u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arlington Heights v. Metropolitan Housing Development Corp.</u> , 429 U.S. 252 (1977)	8, 16, 23
<u>Batson v. Kentucky</u> , 476 U.S. 79 (1986)	8, 22, 23
<u>Gomillion v. Lightfoot</u> , 364 U.S. 339 (1960);	17
<u>United States v. Taylor</u> , 487 U.S. 326 (1988)	15
<u>Wade v. United States</u> , 504 U.S. 181 (1992)	16
<u>Washington v. Davis</u> , 426 U.S. 229 (1976)	12, 17
<u>Wayte v. United States</u> , 470 U.S. 598 (1985)	8, 12, 15, 23
<u>McClesky v. Kemp</u> , 481 U.S. 279 (1987)	15
<u>Regents of Univ. of California v. Bakke</u> , 438 U.S. 265 (1978)	18
<u>Yick Wo v. Hopkins</u> , 118 U.S. 356 (1886)	12, 17
<u>Allen v. City of Beverly Hills</u> , 911 F.2d 367 (9th Cir. 1990)	9
<u>Attorney General v. Irish People, Inc.</u> , 684 F.2d 928 (D.C. Cir. 1982), <u>cert. denied</u> , 459 U.S. 1172 (1983)	24
<u>Diaz v. San Jose Unified School District</u> , 733 F.2d 660 (9th Cir. 1984) (<i>en banc</i>), <u>cert. denied</u> , 471 U.S. 1065 (1985)	8, 23
<u>St. German of Alaska Eastern Orthodox Catholic Church v. United States</u> , 840 F.2d 1087 (2d Cir. 1988)	8
<u>United States v. Bourgeois</u> , 964 F.2d 935 (9th Cir. 1992)	2, 5-9, 22, 24

<u>Rules, Regulations and Statutes</u>	
8 U.S.C. § 1326	21
8 U.S.C. § 1326(a)	25
18 U.S.C. § 924(c)	3

18 U.S.C. § 3006A(b)	1
21 U.S.C. § 841	4, 5
21 U.S.C. § 841(a)(1)	3, 4
21 U.S.C. § 846	3, 5
Rule 10.1 Supreme Court Rules	12
Rule 10.1(c), Supreme Court Rules	15, 17

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Shelton Auntwan Martin hereby opposes the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General in this case.

I.

OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 48 F.3d 1508. The panel opinion of the court of appeals is reported at 21 F.3d 1431. No written opinion was issued by the district court.

* * *

II.

JURISDICTION

The judgment by the Ninth Circuit court of appeals en banc was entered March 2, 1995. The petition for a writ of certiorari was filed by the Solicitor General, after extension, on July 27, 1995. It was received by respondent on July 31, 1995. By letter dated August 21, 1995, respondent was granted an extension of time within which to file an opposition to and including September 29, 1995.

III.

STATEMENT OF THE CASE

In March of 1995, the Ninth Circuit court of appeals en banc found that respondents "established several specific facts, not mere allegations, which establish a colorable basis to believe that the government has engaged in selective prosecution." (App.¹ at 26a, citing United States v. Bourgeois, 964 F.2d 935, 939 (9th Cir. 1992).) The court of appeals did not find that respondents had conclusively proven the existence of either a discriminatory motive or a discriminatory effect. Rather, the court of appeals found that the evidence submitted to the district court was sufficient to provide a colorable basis for believing both the motive and effect might be present and, thus, it was within

the district court's discretion to order the four items of discovery requested by respondent.

The court recognized the seriousness of respondents' claim and found, "[d]iscovery is the crucial means by which defendants may provide a trial judge with the information needed in order to determine whether a claim of selective prosecution is meritorious." (App. at 27a.) The court of appeals found that a district court's responsible concern and discretionary order for a limited inquiry should be applauded and that such an order could not be viewed as an abuse of discretion. (App. at 27a.)

In this case, five young African-American males were charged with violations of federal law in 1992. The indictments alleged violations of 21 U.S.C. § 846, conspiracy to distribute cocaine base; 21 U.S.C. § 841(a)(1), sale of cocaine base; and 18 U.S.C. § 924(c), use of a firearm in connection with a drug offense. The case was investigated by a joint task force consisting of Inglewood Police Department narcotic officers and members of the Bureau of Alcohol Tobacco and Firearms. (App. at 4a.)

The ramifications of the decision to prosecute the case in federal court, rather than in California state court, were severe. The sentencing exposure for respondents rose from 3-5 years in state prison to a mandatory minimum of 10 years and a maximum of life imprisonment in federal prison for the charges under 21 U.S.C. § 841(a)(1) alone. (App. at 4a, 69a-69b.)

Respondent Martin sought information regarding this decision by filing a motion for discovery and/or dismissal

¹"App." shall refer to the Appendix to the Petition for a Writ of Certiorari filed in this case.

based on selective prosecution. Martin claimed the decision to prosecute him federally was based on his race and he sought information to support his claim. All defendants joined in the motion. (App. at 4a.)

In support of the motion, Martin introduced a survey of all cases charging violations of 21 U.S.C. §§ 841, 846 that were closed in 1991 by the Federal Public Defender's Office for the Central District of California. All defendants in those cases were African-American. (App. at 5a.)

The district court found this evidence sufficient to support a limited order for discovery, and ordered the United States Attorney's Office to produce: (1) a list of all cases in the previous three years where the prosecutors charged both cocaine base violations and firearms offenses; (2) the race of the defendants in those cases; (3) whether the cases were prosecuted by state or federal authorities or joint task forces, and (4) the criteria used by the prosecutors for determining whether to bring a cocaine base case to federal court or refer it for state prosecution. (App. at 5a.)

Rather than comply with the order, prosecutors moved for reconsideration and submitted information showing that they had also prosecuted members of other racial or ethnic minority groups during the prior three years, and that some of those were represented by the Federal Public Defender. They were not cases closed by that office during 1991 but, rather, cases that fell outside the survey period. (App. at 5a-5b, 20a.) The prosecutors also submitted a list of 2400 defendants charged with violations of 21 U.S.C. § 841 (generally,

manufacture or distribution of controlled substances) and 1700 charged with violations of 21 U.S.C. § 846 (attempt or conspiracy to commit an offense under the Drug Abuse Prevention and Control Act) during the prior three-year period. They refused to identify the defendants charged with violations involving cocaine base or to identify the race of any of the defendants. (App. at 5a, 33a.)

Respondents then submitted additional evidence by way of declarations showing that potential similarly situated white defendants did exist. (App. at 6a.) The district court affirmed its earlier order of discovery, finding, "[t]he statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal Court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal Court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena." (App. at 7a.)

The district court held further that, "[t]he court sees it different than Bourgeois, in that in this case we do have something more than mere allegations." The district court noted that at issue is "a fairly general charge -- one that we see regularly in this courthouse -- and whether it is coincidental or not, that out of the group that the public defender [proffered] all of them happen to be of the same racial group." (App. at 77a.) The district court concluded,

"the number [of black defendants shown by the public defender] is adequate that [it] would at least require the government to provide some explanation. The time period is such that would require some explanation. The charges are the same or similar, and the race is the same in each case." (App. at 78a.)

The government again chose not to comply with the order to produce the four items and the district court dismissed the indictments as a sanction for non-compliance. (Id.)

On appeal, a three-judge panel of the Ninth Circuit reversed, with one judge dissenting. The court of appeals attempted to resolve a perceived conflict within the Circuit between United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992), and United States v. Bourgeois, 964 F.2d 935 (9th Cir. 1992). The majority adopted the Bourgeois "colorable basis" standard for discovery, but found that respondents' evidence did not furnish a colorable basis for believing that similarly situated white defendants had not been prosecuted and that, consequently, the evidence did not meet the legal threshold for an order of discovery. (App. at 79a-83a.)

The dissent argued that the majority had "abruptly [cut] off exploration of the explosive charge made by these two [sic] defendants, concluding, surprisingly, that Judge Marshall abused her discretion in ordering further discovery." (App. at 85a.)

The dissent criticized the distinctions set forth by the majority among three categories of cases. (Id. at 87a-90a.) It also supported adoption of the Bourgeois standard, noting

that despite the "high threshold" showing required, "under that test a defendant need not come anywhere close to proving a claim of selective prosecution in order to obtain discovery." (App. at 91a.) Thus, both the majority and the dissent agreed that the "colorable basis" standard was an appropriate standard for discovery -- they disagreed on the factual showing necessary to meet it.

The dissent found further that:

[w]hen a defendant presents statistics tending to show that all prosecutions over a significant period of time are directed at member of a single race, such a presentation alone should raise sufficient suspicion to warrant a further inquiry. On closer scrutiny, we may discover that the statistics can be explained by methodological defects ... However, one fact we most assuredly will never find. If our method of analysis is at all fair or rational, we will not discover that it is only members of the defendant's race who commit the crime in question.

(App. at 95a-97a.)

The en banc court adopted the "colorable basis" standard set forth in Bourgeois, and clarified the standard in three ways. First, the court explained that the "high threshold" language in the opinion was erroneous as it appeared to have

"set an artificially onerous burden" on defendants. (*Id.* at 9a).

Second, the court emphasized that to succeed on a claim of selective prosecution, a defendant must show a discriminatory effect and purpose. (App. at 10a, citing Wayte v. United States, 470 U.S. 598, 608 (1985).) These requirements may be met using circumstantial evidence and circumstantial proof of intent which may include evidence of disproportionate impact. (*Id.* at 10a, citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Diaz v. San Jose Unified School District, 733 F.2d 660, 662 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985); Batson v. Kentucky, 476 U.S. 79, 93 (1986).) The court held that evidence of statistical disparity could support both the discriminatory purpose and disparate effect prongs of the standard for discovery. (*Id.* at 11a).

Finally, the court noted that district judges reviewing discovery requests should be mindful of the evidentiary obstacles faced by defendants on a claim of selective prosecution. (*Id.* at 11a.)

The court noted that the circuits generally follow the "colorable basis" requirement although the First, Second, Fifth and Eighth require a *prima facie* showing.² (*Id.* at

12a.) Whatever the semantics utilized, all circuits agree that more than a frivolous showing of both purpose and effect is required to obtain discovery.

Chief Judge Wallace concurred, in agreement that Bourgeois set forth the acceptable standard for discovery although he did not agree that the colorable basis standard needed clarification. He felt the "high threshold" language was appropriate, given the dangers of intrusive review of charging decisions. (*Id.* at 29a.) He agreed that a defendant must provide "hard data about others similarly situated" to establish a *prima facie* case which, if unrebutted, would require dismissal. (*Id.* at 30a-31a.) Chief Judge Wallace noted that any discussion of the requirements for dismissal, and whether the statistics presented in this case would meet those requirements, is "all beside the point at the discovery stage, where only some evidence, tending to show selective prosecution, is required." (*Id.* at 31a.)

Chief Judge Wallace recognized the dangers of second-guessing the ruling of a district court in a discovery matter. (*Id.* at 29a.) He pointed out that, "'[a]bsent a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district court's decision.'" (*Id.* at 30a, citing Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).) He reviewed the

evidence presented to the district court in this case -- the survey of cases closed by the Federal Public Defender in 1991, the two affidavits and the newspaper article -- and pointed

² Citing United States v. Penagaricano-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. German of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994). The court also discussed the "colorable basis" standard adopted by the Third, Sixth, Seventh, Tenth and D.C. Circuits, and the "non-frivolous" standard adopted by the Eleventh and Fourth Circuits.

out that the abuse of discretion standard afforded the district judge "flexibility." (Id. at 30a.)

In dissent, Judge Rymer, joined by Judges Leavy, T.G. Nelson and Kleinfeld, argued that the majority had "[collapsed] intent into effect by holding that both may be shown by the same insubstantial statistic." (Id. at 32a.)

The dissent found the majority opinion "crafts a new standard" rather than clarifying the colorable basis standard and that it allowed discovery on a showing that discrimination "may" have occurred, rather than a definitive showing it had occurred. (Id. at 44a.) The dissent would require a specific showing of a similarly situated non-black offender who was not prosecuted, rather than a colorable basis for believing such an individual exists. (Id. at 46a.)

The dissent did agree that, in limited circumstances, a pattern of prosecution of a single racial group could provide circumstantial evidence of intent. (Id. at 58a.) It disagreed that the statistical evidence presented to the district court here was sufficient to support the inference.

(Id.)

* * *

* * *

IV.

REASONS TO DENY THE PETITION.

A. THE ISSUE PRESENTED IS WHETHER THE NARROW DISCOVERY ORDER ISSUED BY THE DISTRICT COURT CONSTITUTED AN ABUSE OF DISCRETION.

i. The District Court Did Not Abuse Its Discretion And Applied The Appropriate Standard In Ordering Discovery.

This Court need look no further than the court of appeals' ruling in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), to ascertain the unremarkable nature of the essence of the holding in this case. On a virtually identical record, the denial of discovery was upheld -- the true holding in this case is nothing more than a recitation of the truism that great deference is given to the district court's rulings on discovery.

Petitioner would have this Court believe that the court of appeals has significantly altered the standard required for dismissal of a case based on selective prosecution, when all it has done is explain the established standard to be met before discovery may issue. Petitioner confuses these two issues and dramatically inflates the court of appeals' holding. Should this Court grant review, it would be required to do one of two things: review the fact-specific exercise of discretion by a district judge under the deferential abuse of

discretion standard; or review the semantics employed by the circuit courts in selective prosecution discovery cases -- words like "high threshold," "colorable basis," "non-frivolous" and "prima facie." Regardless of the semantics, district judges would still be called upon to exercise discretion in determining whether the factual showing provided met the "standard." It is unlikely this Court's ruling would assist in that task. This Court has determined review is appropriate only "when there are special and important reasons therefor." (Rule 10.1, Supreme Court Rules.) No such reasons are present in this case.

Petitioner correctly advises this Court that selective prosecution claims are reviewed under "ordinary equal protection standards." (Petition at 11, citing Wayte v. United States, 470 U.S. 598, 608 (1985).) See also Washington v. Davis, 426 U.S. 229 (1976); Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, its ensuing discussion is misleading. The standard set in Wayte for dismissal of all charges requires conclusive proof of discriminatory effect and of discriminatory purpose. Petitioner claims discriminatory effect, sufficient to allow a discretionary discovery order to stand, must be established by a specific showing that similarly situated defendants have not been prosecuted. (Petition at 11-12.) Wayte tells what is needed for ultimate victory on a selective prosecution claim. No case requires that a defendant offer conclusive proof of the ultimate issue to obtain discovery. Such a requirement would strain common sense.

Chief Judge Wallace recognized this fact in his concurrence to the en banc opinion when he stated, "[t]he language of the colorable basis standard does indicate that specific facts must exist to establish the basis for believing that 'discriminatory application of law' and 'discriminatory intent' are present. But without discovery, the contention that 'others similarly situated' have not been prosecuted (a claim essential to the prima facie case) may be impossible to show." (App. at 31a.)

Discovery is the first step a defendant can take toward proving a claim. To require more specific and conclusive proof than was offered in this case would signal the death of selective prosecution claims. This Court must see clearly that what is at issue is a mere discovery order, upheld under the abuse of discretion standard.

The Ninth Circuit court deferred appropriately to the district court's findings, noting "[w]e are mindful that it is only a discovery order that we are reviewing To order discovery, the district court need not decide that the defendants have in fact demonstrated the existence of selective prosecution. If such conclusive determinations could be made without discovery, there would be no need for discovery in the first place. Thus, the evidence necessary to obtain a discovery order when a charge of selective prosecution has been made is obviously substantially less than that needed to prove the charge itself." (App. at 8a.)

The district court, in line with direction given by this Court and the court of appeals, determined that the

established standard for issuance of a limited discovery order had been met. Such a ruling is not a fundamental change in the law, nor is it a radical departure from the task performed daily by district judges in every circuit. The reason we are here is simple -- petitioner believes no review should be allowed by the judiciary of its charging practices, and no access by the public should be permitted to information innocuous in and of itself, which might point to the frightening possibility of institutional racism in our law enforcement arena.

Although no new standard has been applied or articulated by any court in this case, petitioner claims the court of appeals' rulings "fundamentally change the legal principles that have governed selective prosecution claims until now." (App. at 11.) The narrow holding of the court of appeals at issue here is that the district court did not abuse its discretion when it ordered limited discovery, applying the

colorable basis standard.³ This Court has previously held: Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise. Had Congress merely committed the choice of remedy (for violation of the Speedy Trial Act) to the discretion of district courts, without specifying factors to be considered, a district court would be expected to consider "all relevant public and private interest factors," and to balance those factors reasonably. Appellate review of that determination necessarily would be limited, with the absence of legislatively identified standards or priorities.

United States v. Taylor, 487 U.S. 326, 336 (1988) (citation omitted).

In Taylor, it appeared that the court had so far departed from the accepted and usual course of judicial proceedings that review by this Court was appropriate.⁴ This case

* * *

* * *

³Petitioner claims that the court of appeals established a new standard for dismissal based on a selective prosecution claim. (Petition at 18.) However, the standard for dismissal was clearly set forth in Wayte. No dismissal for selective prosecution has occurred and, thus, this issue is at best premature. Additionally, petitioner's reliance on McClesky v. Kemp, 481 U.S. 279, 313 (1987), seems superfluous -- this case is not about the ultimate issue. (Petition at 18.) McClesky offers no guidance in a dispute over discovery.

⁴See Rule 10.1(c), Supreme Court Rules.

presents a situation where discretion is fact-specific. Such a case presenting a discretionary order for discovery requires one conclusion -- appellate review is appropriately limited and deference is given appropriately to the district court.

ii. The Court Of Appeals Did Not Hold That The Evidence Proffered In Support Of The Discovery Request Would Meet The Standard For Dismissal.

Petitioner offers an analogy to Wade v. United States, 504 U.S. 181 (1992), to support its argument that a substantial showing should be required before a discovery order may issue questioning government motives. (Petition at 14). Petitioner argues further that the court of appeals has "dispens[ed] with an essential element of a claim selective prosecution" because it did not require specific evidence of similarly situated non-prosecuted defendants, but rather found only that a colorable basis for believing such defendants exist would suffice. (Petition at 15.) This is not accurate -- the court of appeals merely interpreted the evidence presented in a common sense fashion and found it did meet the standard for discovery, albeit not yet for dismissal.

Statistical studies can provide evidence of both intent and effect. This court has noted, "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266

(1977). See also Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Washington v. Davis, 426 U.S. 229 (1976).

It is petitioner that tries to meld into one both the standard applicable to a motion to dismiss and the standard applicable to a motion for discovery --- this is discovery, not dismissal. The court of appeals recognized the difference, as will this Court.

iii. This Case Does Not Present An Important Question Of Federal Law And It Has Not Had A Major Impact On The Administration Of Justice.

Rule 10.1(c) of the Supreme Court Rules indicates that this Court will consider review when a, "United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Petitioner seems to claim that the district court's order that the government provide limited discovery without a concrete showing of a similarly situated non-minority who was not prosecuted is such an important question which, "threaten[s] to have a substantial impact on the prompt and effective enforcement of the criminal law." (Petition at 11.) This prediction is both hyperbolic and speculative and has been proven incorrect by cases following the ruling in the Ninth

Circuit.⁵ The United States Attorney recently responded to

* * *

* * *

* * *

⁵Petitioner's listing of cases remanded after the ruling of the court of appeals reflects motions that were filed before the court of appeals' ruling in this case. They are merely indicative of the result of any clarification of a standard. (Petition at 24-25 at n.4.) Cases must be considered under the articulated standard -- such would be the same result had this Court issued a new ruling clarifying or adopting a standard. On remand, few of these motions have even been granted.

In addition, petitioner's stated concern for potential discovery disputes involving white defendants or based on gender seems disingenuous. (Petition at 25-26.) One need only review the dissenting opinion by Justice Marshall in Regents of Univ. of California v. Bakke, 438 U.S. 265, 387-401 (1978), to be reminded of the prejudices that have plagued black Americans -- the disparity of the crack cocaine sentencing structure seems but the latest injustice visited upon this segment of our citizenry. White LSD or antitrust defendants would hardly have the same argument -- nor are they subjected to the harsh sentencing scheme that would apply to respondents.

one motion which has, thus far, been the end of the effort required.⁶ The problem is not that their response required a massive effort. It did not.

The problem is that the United States Attorney's Office in the Central District of California was simply loathe to comply with any order. In the face of the national problem which has impacted our African-American communities, such a stand was simply arrogant. Its compliance with later requests indicates even it recognized the inappropriateness of its stand. In fact, petitioner has gone so far as to label "intrusive" the concern of the judiciary for the freedom of our citizens from discriminatory prosecution practices.

(Petition at 22.)

⁶In United States v. Henry, No. 94-628-CBM (C.D. Cal. June 26, 1995), the prosecutors opposed a motion for discovery re: selective prosecution filed by defendants charged with violations of the cocaine base statute. The prosecutors filed an extensive opposition, including many declarations. The motion was then denied by Judge Marshall, the same district judge who ruled on the motion that is the subject of petitioner's request. That same opposition continues to be filed by the prosecutors, and the motions continue to be denied. (See Petition at 22a-23a.) (See "Judge Rejects Claims of Bias in Crack Case," Los Angeles Times, A3-A11 (June 27, 1995).) A similar motion was denied in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), and that denial was upheld. In United States v. Nolan Reese, No. 94-5026 (9th Cir. July 26, 1995), the district court denied a discovery motion and that case was remanded for reconsideration in light of the court of appeals holding in this case. The court expressly cautioned that it was not advocating a reversal of the district court's earlier ruling and was not advising the court on how to exercise its discretion. It seems clear, then, that had the prosecutors responded thus to the motion filed in this case, that motion might also have been denied.

One must conclude the prosecutors simply realized they were wrong to defy the court's earlier legitimate order and cured their error in the Henry case. One must also conclude that their work is over and no perceptible impediment to the law enforcement effort has occurred.

Recently, the Ninth Circuit has had occasion to apply the colorable basis standard articulated in this case. In United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), the defendant submitted the same survey as respondents proffered in this case, along with one newspaper article, in support of a motion for discovery regarding selective prosecution. Marshall appeared to be a large-scale drug dealer, arrested and charged with over 5 kilos of crack cocaine in his apartment, along with over 1 kilo of powder cocaine. (Id. at 1211.) The court of appeals upheld the denial of discovery, finding that Marshall had not provided evidence that the defendants in the Federal Public Defender's survey were similarly situated large-scale dealers. (Id. at 1212.) The court of appeals found no abuse of discretion in the district judge's refusal to order discovery.

Similarly, in United States v. Estrada-Plata, 57 F.3d 757 (9th Cir. 1995), the court of appeals applied the en banc court's ruling in this case to three different selective prosecution claims, finding no abuse of discretion in the district court's denial of each. (Id. at 760-761). The court specifically noted that the ruling in this case did not "change [the] longstanding rule" established in United States v. Wayte, 710 F.2d 1385, 1387 (9th Cir.), aff'd, 470 U.S. 598 (1985), that a *prima facie* showing of invidious discrimination requires proof of similarly-situated non-prosecuted individuals and proof of discriminatory intent. (Id. at 760 and n.1.) The court also pointed out that review of the

factual determinations supporting those factors would be for clear error. (Id. at 760.)

Finally, in United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995), the court of appeals reviewed an order for circuit-wide discovery in a selective prosecution challenge to prosecutions under 8 U.S.C. § 1326. It applied the en banc ruling in this case and reversed the district judge, finding that the order for circuit-wide discovery was an abuse of discretion where no evidence was presented that any "decision-making [regarding prosecutio.] occurred at the circuit level." (Id. at 305.)

This is hardly a revolutionary ruling. Instead, the ruling in this case has been and is being narrowly and reasonably applied.

B. THE COURT OF APPEALS RULING HAS NOT CREATED A CONFLICT AMONG THE CIRCUITS -- ALL CIRCUITS AGREE THAT A DEFENDANT MUST PROVIDE EVIDENCE OF SIMILARLY SITUATED NON-PROSECUTED INDIVIDUALS TO OBTAIN DISCOVERY ON A CLAIM OF SELECTIVE PROSECUTION.

Petitioner claims review is appropriate because the opinion of the court of appeals "conflicts with decisions from numerous courts of appeal that have required defendants to make a threshold showing that similarly situated persons have not been prosecuted before discovery may be ordered . . ." (Petition at 11, 19.) However, it then appears to concede there is no conflict in the standard and that "the circuits

that have squarely addressed the issue have all held that, before obtaining discovery, a defendant must make a threshold showing that other similarly situated have not been prosecuted." (Id. at 19.)

The court of appeals has not abandoned the principle set forth in Bourgeois, as petitioner suggests. (Petition at 21.) Rather, the court held that the colorable basis requirement was met. (Petition at 4a). It has merely ruled that the district court's determination that the standard was met was not an abuse of discretion. Surely such a finding deserves this Court's deference as well.

The court of appeals affirmed the standard articulated in Bourgeois and clarified its meaning. The court noted that the standard could be met by "some evidence tending to show the essential elements of the claim." (App. at 8a, citing United States v. Heidecke, 900 F.2d 1155, 1159 (7th Cir. 1990).) More than a frivolous showing or conclusory allegation must be advanced by a defendant. (Id. at 8a.) Thus, the court did not hold that mere suspicions or allegations by a defendant would suffice --- it merely held that the threshold showing required should not be so high as to place an "artificially onerous burden" on a defendant. (Id. at 9a.) This Court has held in Batson v. Kentucky, 476 U.S. 79, 93-97 (1986), that a pattern of behavior may provide an "inference of purposeful discrimination." Such a pattern would necessarily provide more than a suspicion or mere allegation.

In fact, the court of appeals, like all other circuits, and following the dictates of Wayte, held that ultimate success on a claim of selective prosecution can only be achieved upon a conclusive showing of discriminatory effect and purpose. (See App. at 9a-10a.) The specifics of the proof required for discovery is what is at issue here -- a matter traditionally left to the judgment and discretion of district judges.

The evidence submitted to the district court in this case provided a colorable basis to believe others similarly situated had not been prosecuted. The district judge retained the discretion to determine that the explanation provided by prosecutors was simply not enough to cause reconsideration of her ruling. As the dissent to the panel opinion here stated, "[g]iven the prevalence of all kinds of drugs throughout our community, at least some crack distributors must be non-blacks." (App. at 95a.) Prosecutors have never disputed this fact nor have they claimed that no similarly situated white offenders exist.

The court of appeals explained, as this Court has long recognized, that in the extreme case, evidence of invidious purpose or intent may include circumstantial evidence, including evidence of impact. (App. at 10a, citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977); Diaz v. San Jose Unified School District, 733 F.2d 660, 662 (9th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985); see also Batson v. Kentucky, 476 U.S. 79 (1986).)

The court of appeals noted that its adoption of the Bourgeois colorable basis standard rendered the law of the circuit more in line with other circuits. (App. at 13a-14a.) The court deliberately declined to adopt a less frivolous standard in recognition of the dangers of overly intrusive judicial review of prosecutorial decision-making. (Id. at 14a.)

Petitioner relies on Attorney General v. Irish People, Inc., 684 F.2d 928, 947 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983), to remind the Court that the government enjoys a presumption of having acted in good faith and in a nondiscriminatory manner when prosecuting cases, and that a colorable showing of similarly situated individuals is necessary for discovery. (Petition at 16, 19.) Irish People was, in fact, a civil case where a defendant claimed it was singled out for prosecution because of its editorial policy. No statistics were offered and no facts supported the defense suspicion. The court stated, "[b]ecause we conclude that the findings of the district court demonstrate not even a colorable showing of selective prosecution, reversal is proper whether or not the showing which a defendant must make to obtain discovery differs from the showing it must make at trial to establish a prima facie case of selective prosecution . . . we find further at this time that defendant in fact need make only a colorable showing of each prong of the defense in order to be entitled to discovery." (Id. at 932 n.8.)

In United States v. Cooks, 52 F.3d 101 (5th Cir. 1995), the Fifth Circuit upheld the denial of a defense motion for

discovery relating to selective prosecution. Cooks presented evidence of a national report noting a large increase in drug arrests in recent years and he noted the existence of statistics showing the "overwhelming majority" of those arrested for possession of cocaine base are minorities.⁷ Cooks did not offer evidence of "discriminatory animus." Cooks did not carry the "heavy burden" of proving selective prosecution, nor did the court find he had established a "colorable claim," sufficient to allow discovery. (Id. at 105.) However, the 5th Circuit clearly held the "heavy" burden referred to dismissals, not discovery.

The Second Circuit held in United States v. Fares, 978 F.2d 52, 59 (2d Cir. 1992), that, "[t]o warrant discovery with respect to a claim of selective prosecution, a defendant must present at least 'some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements.' Mere assertions and generalized proffers on information and belief are insufficient." (Citations omitted.) The court found no abuse of discretion where the district court denied discovery based on Fares' assertion he was prosecuted for illegal re-entry because of the government's claim he was a member of Hizbellah in a district that rarely prosecuted violations of 8 U.S.C.

⁷From arrest statistics one could, at most, infer selective enforcement by the police. Here, the district court was presented with statistics regarding federal prosecutions, not arrests. Thus, this case is distinguishable from Cooks.

§ 1326(a) violations. (*Id.* at 58.) The government had countered his claim by showing 13 other prosecutions had occurred in that district, and Fares did not rebut that showing with large numbers of similarly situated non-prosecuted individuals. (*Id.* at 60.) Fares provided no evidence, but only mere allegations which all circuits reject as a proper showing required for discovery.

The Fourth Circuit held in United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986), that a nonfrivolous showing of both effect and purpose were required to entitle a defendant to discovery. A reversal of the district court's finding that a claim does not meet the standard is reviewed for abuse of discretion. Greenwood's claim of racial animus and personal vindictiveness on the part of his supervisor had been denied by affidavit and had no factual support independent of Greenwood's own statements. (*Id.* at 52.) Thus, the denial of discovery was upheld, the court finding that his request was frivolous, a mere "fishing expedition." (*Id.* at 53.)

In United States v. Peete, 919 F.2d 1168 (6th Cir. 1990), the Sixth Circuit reviewed a selective prosecution claim in the context of a Hobbs Act prosecution. The court relied on United States v. Schmucker, 815 F.2d 413 (6th Cir. 1987), and affirmed the standard for discovery established therein. In Schmucker, the court held that, "'[a] defendant may . . . be entitled to discovery on the issue of selective prosecution if he introduces some evidence tending to show the existence of the essential elements of the defense.' " 919 F.2d at 1176,

citing Schmucker at 418. Peete proffered only his own "self-serving affidavit" and that of his counsel to indicate others similarly situated had not been prosecuted. (*Id.*)

In United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994), the defendants were charged with Voting Rights Act violations. In support of their motion for discovery regarding a claim of selective prosecution, they proffered only affidavits indicating harassment and intimidation of black voters. (*Id.* at 846 n.3.) The court held that the defendants must establish a prima facie case of selective prosecution, including a showing that others similarly situated had not been prosecuted and that an impermissible motive was behind the failure to prosecute. The court of appeals upheld the findings of the district court that the showing was inadequate. (*Id.* at 846-47.) The Eighth Circuit ruled that the defendants must show that a similarly situated individual was not prosecuted in order to meet the threshold requirement. (*Id.* at 847.) No statistical evidence was presented and, like the other cases cited by petitioner, this case confirms that the district court's findings on a motion for discovery will rarely be disturbed.⁸

Thus, all cases cited by petitioner fail to offer support for the prosecutor's decision to refuse the discovery order.

⁸All cases cited by petitioner reflect fact-specific findings by district courts that are not disturbed on appeal, reflecting the deference given to district courts in the discovery arena. In fact, the court of appeals in United States v. Marshall, 56 F.3d 1210 (9th Cir. 1995), noted it would not have disturbed the district court's ruling either way on the facts presented.

(Petition at 19-20.) Nor do they show that the district court abused its discretion in ordering discovery. Contrary to petitioner's claim, the decision in this case has not "created" a conflict in the circuits. (Petition at 21.)

V.

CONCLUSION

Respondents offered a legitimate inquiry into the charging decisions that led to their prosecution in federal court, and concomitant exposure to sentences ranging from 35 years to life without parole for offenses that are far less serious than many that occur in their community. Their inquiry deserves the respect of the government, not the belittling and invalidating suggestion that this request was made for the purpose of delay. (See Petition at 13-14.) Such a response is shocking given the concern in our nation and, in particular among our judiciary, for the plight of the young African-American male charged in federal court. (See App. at 40a and n.4, noting the "legitimate and widespread" concern for the impact of mandatory minimum sentences, particularly with regard to cocaine base offenses, on young black males and referencing the findings of the United States Sentencing Commission that 87.9% of all those convicted in federal court for cocaine base violations are African-American.)

This Court is asked to consider whether a district judge abused her discretion by ordering prosecutors to provide limited information on their prior charging decisions, when

the defense provided evidence that those practices may have been discriminatory. A response to Judge Marshall's order would have sufficed. This is simple arrogance which should not be tolerated by this Court. No review by this Court is appropriate and no writ of certiorari should issue.

For the foregoing reasons, Shelton Auntwan Martin respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,
MARIA E. STRATTON
Federal Public Defender

DATED: September 28, 1995

Barbara O'Connor
BARBARA E. O'CONNOR
Deputy Federal Public Defender
Attorney for Respondent
SHELTON AUNTWAN MARTIN

ORIGINAL

No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

UNITED STATES OF AMERICA, PETITIONER

vs.

CHRISTOPHER LEE ARMSTRONG, ET. AL., RESPONDENTS

CERTIFICATE OF SERVICE

I, Barbara E. O'Connor, hereby certify that on this 28th
day of September, 1995, a copy of Motion for Leave to Proceed
in Forma Pauperis, Affidavit and Opposition to Petition for
Writ of Certiorari to the United States Court of Appeals for
the Ninth Circuit were mailed postage prepaid, to the
Solicitor General of the United States, Department of Justice,

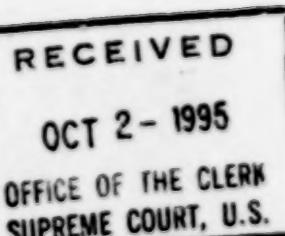
Washington, D.C. 20530, counsel for the Petitioner, along
with all counsel as listed on the attached service list.

Respectfully Submitted,

DATED: September 28, 1995

Barbara O'Connor
BARBARA E. O'CONNOR
Deputy Federal Public Defender
United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
Telephone No. (213) 894-2234

Attorneys for Respondent
SHELTON AUNTWAN MARTIN



SERVICE LIST

Drew S. Days, III
Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20503

David Dudley
Attorney at Law
1999 Avenue of the Stars
Suite 2800
Los Angeles, CA 90067

Timothy C. Lannen
Attorney at Law
880 West First St.
Suite 1500
Los Angeles, CA 90012

Joseph F. Walsh
Attorney at Law
316 W. Second St.
Suite 1200
Los Angeles, CA 90012

Bernard J. Rosen
Attorney at Law
1717 Fourth St., Third Floor
Santa Monica, CA 90401-3319